IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 20 OF 2004

STATE
through Public Prosecutor,
High Court of Bombay
at Panaji. ... Appellant

versus

Rajesh Pagi @ Dhuri,
S/o Anand Pagi,
R/o H.No.220,
Sadolxem, Canacona-Goa. ... Respondent

Mr. S. N. Sardessai, Public Prosecutor for the Appellant.

Mr. J. Mello, Advocate for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 17TH SEPTEMBER, 2004 &
24TH SEPTEMBER, 2004.

ORAL JUDGMENT

The State has filed this appeal under Section 377 of the Code of Criminal Procedure, 1973(Code, for short) against the inadequacy of sentence imposed upon the accused in Criminal Case No.150/S/2002/F by the learned Judicial Magistrate, First Class, Margao, by Judgment/Order dated 29th September, 2003.

2. The accused has also prayed for his acquittal in terms of sub-section 3 of Section 377 of the Code.

3. Sub-Section 1 of Section 377 of the Code provides for appeal by the State Government against sentence and sub-section 3 of Section 377 of the Code provides that in such appeal sentence shall not be enhanced unless the accused is given a reasonable opportunity of showing cause of such enhancement and while showing cause, the accused is entitled to plead for his acquittal or for the reduction of the sentence.

4. I shall, therefore, consider first whether the accused is entitled for acquittal.

5. There is no dispute that the accident took place between a Fiat car having No.GDF 1282 driven by P.W.5, Shaikh Shabbir and Excavator(Poklin, for short) having No.GA-02-A-7834 driven by the accused. The said accident took place on 22nd February, 2002, at about 20.30 hours at Davorlim in front of the shop of P.W.2, Jose Gomes, while the said Fiat car was proceeding in the direction from Davorlim to Margao and the said Poklin was coming from Margao to Davorlim, in opposite direction.

6. There is also no dispute that in the said accident, Ramesh, son of Betikar, aged about 40 years, who was sitting on the back seat

of the car died on the spot. The report of his autopsy was produced by P.W.8, Dr. E. J. Rodrigues, who has certified his death as being caused due to injuries on chest and abdomen in the said vehicular accident. There is also no dispute that P.W.1, Raju Naik, and P.W.4, Shekhar Naik, who were sitting in front of the car and at the back of the car respectively also suffered injuries which were proved through P.W.6, Dr. A. Afonso.

7. The panchanama of the scene of offence was conducted at about 9.30 p.m. by P.W.11, Head Constable, Krishna Gawas, in the presence of P.W.3, Raymond Fernandes. The said panchanama and the said sketch were produced at Exh.PW3/A colly. The said sketch shows that the width of the tar road at the place of accident was about 5 metres. It also shows that the distance between the front left wheel of the said car and the edge of the road is 30 cms, while the distance between the left front wheel and the edge of the road is about 1.85 metres.

8. The case of the prosecution was that the said accident took place on account of the rash and negligent driving of the said Poklin by the accused resulting in the death of the said Ramesh S. Betikar and simple injuries to P.W.1, Raju Naik and P.W.4, Shekhar Naik. On the other hand, it was the case of the accused, when the accused was examined under Section 313 of the Code, that there were two cycles, one scooter and one rickshaw which were parked in

front of the said gada/shop of P.W.2, Jose Gomes, which were blocking the road and that after seeing the said vehicle, the accused was about to sideline the said vehicles and was about to cross them when the said Fiat car came suddenly from his direction, without headlight and dashed against his vehicle(Poklin) due to which the accident took place. The accused also stated that the accident took place on account of the mistake of the said Fiat car and not due to his mistake. The accused also examined himself and in his evidence stated that on seeing the said rickshaw and other vehicles, he halted for some time and at that time, the said Fiat car came from opposite direction and dashed on his vehicle. The accused further stated that the Fiat car had no headlights on and he could not see it but his vehicle had lights working at that time. The accused also stated that after the dash, all the vehicles which were parked near the said gada were taken away by the driver.

9. The learned trial Court after assessing the evidence of 12 prosecution witnesses which were examined, came to the conclusion that the accident took place on account of rash and negligent driving of the said Poklin by the accused.

10. Mr. S. N. Sardessai, learned Public Prosecutor on behalf of the State, has submitted that the learned trial Court after correct assessment of the evidence led by the prosecution has come to the conclusion that the accident took place on account of the rash and

negligent driving by the accused and, therefore, the said finding be not disturbed.

11. On the other hand, Mr. J. Melo, learned Counsel of the accused has submitted that the learned trial Court has not at all considered whether the version given by the accused was at all plausible and that it was a fit case to give benefit of doubt to the accused. Mr. Melo, learned Counsel has also taken me through the evidence of the prosecution witnesses. One of his grievance is that none of the witnesses say that the accused had driven the said Poklin in a rash and negligent manner. His other grievance is that the learned trial Court ought not to have granted leave to the prosecution to cross-examine the witnesses.

12. Mr. Melo, has submitted that the plausibility of the explanation given by the accused has not at all been considered by the learned trial Judge. Mr. Melo, has also placed reliance on several decided cases.

DATE : 24TH SEPTEMBER,2004.

13. In the case of **State of Goa** v. **Vaman Rama Salgaonkar** (2001(1) GLT 172) this Court observed that the defence story has to be tested on the touchstone of probability and the defence does not merit outright rejection. In the case of **Prashant G. Karande** v.

State of Maharashtra and others(2003 ALL MR(Cri.) 2187) this Court observed that for the purpose of coming to a conclusion whether a person is driving a vehicle rashly or negligently, number of factors have to be considered such as speed, indifference towards speed and control of the vehicle, driving the vehicle in clumsy way, driving the vehicle by taking dangerous turns, without bothering about the fate of the persons using the road like him; including other vehicles drivers and pedestrians and the persons sitting by the side of the road, etc., etc. In the case of **Jayprakash Laxman Tambe** v. **State of Maharashtra**(2003 ALL MR (Cri.) 2191) this Court observed that the words “negligence” or “rashness” in Section 304-A IPC have to be understood in proper sense and in proper spirit. Negligence indicates total negligence on the part of the driver. It means that he was driving the vehicle in such a negligent way which would stamp his driving by only words “negligence”. Rashness indicates that he drives the vehicle in such a way while driving he knows that by such driving he is likely to invite an accident but hopes that such accident may not occur. The Court also observed that if the accused raises a specific plea, basis for it has to be created in the cross-examination of prosecution witnesses and it has to be answered in the answers given in the examination of the accused under Section 313 of the Code and if the situation demands, such an accused has to lead defence evidence also to prove that situation at least to the point of preponderance of probability. In the case of **Kisan Pandurang Pachange** v. **State of Maharashtra**(2004(1) Mh.L.J. 261) this Court

observed that for bringing home the case under Section 279 and 304-A of the IPC, it is necessary that the case of negligence and rashness has to be proved. It is the duty of the prosecution to prove that the driver was driving the vehicle in such a way that it showed disregard for life and safety of others or that the rashness was of such a degree so as to amount to taking hazard knowing that the hazard was of such a degree that iujury was most likely to be occasioned thereby.

14. In the case at hand, P.W.1, Raju Naik, who was admittedly sitting on the front seat of the Fiat car had stated that as they were returning from Ramnagar to Margao, the said Poklin came from their opposite direction and gave a dash on their vehicle when they were on the left side of the road at the relevant time. It is true that he did state that he saw the said Poklin for the first time when it gave a dash on their Fiat car. He categorically denied that since there were vehicles parked near the said gada/shop, the accused had taken his Poklin towards the right side of the road. It was certainly not necessary for P.W.1, Raju Naik, or for that matter other prosecution witnesses to have repeated the words of the Section, even assuming that they were conversant with english language. All that the prosecution witnesses are required to do is to state facts from which rashness or negligence can be inferred and proved. When P.W.1, Raju Naik, stated that when they were on the left side of the road, the said Poklin came from opposite direction and dashed

against their vehicle, this was sufficient to show that the dash had taken place due to the fault of the driver of the said Poklin.

15. P.W.2, Jose Gomes, was cross-examined by the prosecution and the said permission was granted to the prosecution to cross-examine him after perusing the statement of P.W.2, Jose Gomes, as recorded earlier in the course of investigations. Although, the learned trial Court might have not recorded her satisfaction while granting leave to the prosecution to cross-examine the said witness, in so many words, the very fact that she had perused the said statement and granted permission would tend to show that she was satisfied that it was a fit case to allow the prosecution to cross-examine the said P.W.2, Jose Gomes. P.W.2, Jose Gomes, has ruled out the plausibility of the plea of the accused by stating that he had not seen whether one rickshaw, two scooters and a cycle were parked by the side of his gada. One could certainly infer that if the said vehicles were there outside at the relevant time he would have certainly seen the same if not prior to the accident at least after the accident.

16. P.W.4, Shekhar Naik, was sitting at the back of the said car. He stated that their car was going on the left side of the road and the Excavator came in the middle of the road due to which the accident took place. He stated that their car was at a speed of 40 kms. per hour and while he sustained injuries, the said Ramesh

expired in the accident. It is true that P.W.4, Shekhar Naik, stated that they had dropped P.W.10, Mohan Tandel, at Ramnagar but P.W.10, Mohan Tandel, himself as well as P.W.5, Shaikh Shabbir, have confirmed the presence of P.W.10, Mohan Tandel in the car at the time of accident. There was no reason to disbelieve P.W.4, Shekhar Naik, only because he had stated that they had dropped P.W.10, Mohan Tandel, at Ramnagar.

17. P.W.5, Shaikh Shabbir, had stated that he was sitting at the back of the said car along with the said P.W.10, Mohan Tandel, and the accident took place as the Excavator came without headlight on and in the middle of the road. He also stated that on seeing the said Excavator, he halted his Fiat car on the left side of the road but the said Excavator came directly and gave a dash on his car. In cross-examination, he might have stated that he was driving at a speed of about 20 kms. per hour or so and again, it might have been stated by P.W.9, Ivo Rodrigues, that it is not possible for any person to drive a vehicle at a speed of 20 kms. per hour in top gear. However, the fact remains that P.W.5, Shaikh Shabbir, stated that he was driving at a speed of about 20 kms. or so which could as well mean that he was driving a little more than the said speed but it is nobody's case that he was driving at an excessive speed. P.W.5, Shaikh Shabbir, is very much supported by the panchanama and the sketch when he stated that on seeing the Excavator, he had halted the Fiat car on the left side of the road.

18. P.W.10, Mohan Tandel, had stated that he could not recollect as to how the accident took place and he too was cross-examined by the prosecution and in the said cross-examination, P.W.10, Mohan Tandel, practically admitted everything he had stated earlier in his statement to the Police. He admitted having stated that the Poklin had come in opposite direction and the driver of the Fiat car having taken his car completely by the side of the road and that the said Poklin had also lost its original side of the road and dashed against the car. He also admitted that he saw the Poklin for the first time only after the impact and that the headlights of the said Poklin were not working after the impact.

19. The learned trial Court rightly accepted the evidence of the prosecution witnesses particularly P.W.1, Raju Naik, P.W.4, Shekhar Naik and P.W.5, Shaikh Shabbir. The learned trial Court also rightly observed that the plea of the accused was not supported either by the panchanama or any other evidence. Even assuming that the said rickshaw and other vehicles were parked by the side of the road, the accused had a duty to stop his vehicle behind the said vehicles and had no business to go on the right side of the road having total disregard to the oncoming traffic particularly the said Fiat car. In his evidence, the accused stated that the Fiat car had no headlights and that he himself had first halted and at that time, the Fiat car came from opposite direction and dashed his vehicle. Firstly,

in case the accused had halted his vehicle behind the said other vehicles then the vehicle of the accused would not have been shown on the sketch in the manner proved by the prosecution. The story of the accused that his side of the road was obstructed by the vehicles finds no support whatsoever in the evidence of the prosecution witness and, therefore, such a plea was rightly rejected. Even assuming that there were such vehicles then as already stated, there was a duty cast on the accused to have halted behind the said vehicles and allowed the traffic coming from his right to pass first and then only cross the said vehicles and go ahead. In this case, the accused, it appears, having total disregard to the oncoming vehicle drove his said Poklin towards the right side of the road and in that process dashed against the car driven by P.W.5, Shaikh Shabbir. Rashness in acting with the consciousness that dangerous consequences will follow, but with the hope that they will not follow and with the belief that sufficient precautions to prevent the happening of such consequences have been taken. Criminal negligence is gross or culpable neglect or failure to exercise due and reasonable care or caution to generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it is the imperative duty of the accused person to have adopted. As already stated, it was the duty of the accused, in case if at all there were some vehicles to stop behind them and allow the car of P.W.5, Shaikh Shabbir, to pass. The accused in total disregard of this duty and in disregard to the oncoming traffic drove

his Poklin not only without headlights but on the wrong side of the road and dashed against the said Fiat car which was coming on its correct side of the road and in doing so, the accused drove the vehicle rashly. The accused was, therefore, rightly convicted by the learned trial Court.

20. Regarding sentence, it must be observed that to suffer punishment is to pay a debt due to the law that has been violated. It has always got to be proportionate to the crime committed by an accused. It cannot be a flee bite, as it is often said. At the same time, it also should not be a bee sting, if I may use that expression. On behalf of the accused, reliance has been placed on several decisions in support of the submission that the learned trial Court having exercised her discretion in awarding adequate sentence this Court ought not interfere.

21. In the case of **Sevaka Perumal and another** v. **State of Tamil Nadu**((1991) 3 SCC 471 the Supreme Court observed that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society cannot long endure under serious threats. If the courts do not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The law

regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proctivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of order should meet the challenges confronting the society. In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation of sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused and all other attending circumstances are relevant facts which would enter into the area of consideration.

22. In the case of **Sushil Murmu** v. **State of Jharkhand** ((2004) 2 SCC 338) the Supreme Court has observed the principle of proportion between crime and punishment is a principle of just deserts that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar

or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just deserts, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime, yet in practice sentences are determined largely by other considerations, sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence, sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably, these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment

injustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences. In support of the submission that the sentences imposed by the learned trial Court is nothng by a field of sentence, Mr. S. N. Sardessai, learned Public Prosecutor has also placed reliance on several cases.

23. In the case of **Sevaka Perumal** v. **State of Tamil Nadu** (AIR 1991 SC 1463) the Supreme Court has stated that the doctrine of benefit of doubt does not enter in the area of consideration of imposing sentence. In the case of **Sham Sunder** v. **Puran and another**(AIR 1991 SC 8) the Supreme Court has stated that the measure of punishment should be proportionate to the gravity of the offence. In the case of **State of Madhya Pradesh** v. **Ghanshyam Singh**(2003 CRI.L.J. 4339) the Supreme Court stated that long pendency of the case cannot by itself justify lesser sentence and that just and proper sentence is to be imposed after giving due consideration to the facts and circumstances of each case. The Supreme Court also stated that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats and, therefore, it is the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

24. In the case of **Ratan Singh** v. **State of Punjab**(AIR 1980 SC 84) which is a case under Section 304-A IPC the accused was sentenced to two years rigorous imprisonment. The Supreme Court refused to accept the submission that the accused had a large family in that case to maintain and that the proprietor of the truck has left his family in the cold. The Supreme Court observed that when a life has been lost and the circumstances of driving are harsh, no compassion can be shown. The Supreme Court further observed that sentencing must have a policy of correction. The driver, if he has to become a good driver, must have a better training in traffic laws and moral responsibility, with special reference to the potential injury to human life and limb. Punishment in this area must be accompanied by these components. In the case of **Dalbir Singh** v. **State of Haryana** (AIR 2000 SC 1677) the Supreme Court observed that bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, Criminal Courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act, 1958. While considering the quantum of sentence, to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single

moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident or even if any accident occurs it need not necessarily result in the death of any human being or even if such death ensures he might not be convicted of the offence and, lastly, that even if he is convicted he would be dealt with leniently by the Court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of vehicle he cannot escape from jail sentence. This is the role which the Courts can play particularly at the level of trial Courts, for lessening the high rate of motor accidents due to callous driving of automobiles.

25. In our own State, we are all aware how the number of deaths have been increasing on the roads, year after year, due to the rash and negligent driving of the vehicles. Although, there are no golden scales to measure punishment to be given in a given case nevertheless it is well said that it should be adequate to the crime committed by the accused. Section 304-A IPC provides punishment of imprisonment of either description for a term which may extend to two years or with fine or with both. The learned trial Court was not right that the crime committed by the accused was not against the society. All crimes committed under the penal law are against the society. Likewise, the learned trial Court was also wrong that there was no deliberate intention on the part of the accused to cause the

accident. Accidents are caused when vehicles are driven having total disregard to the conditions of the road and other vehicular traffic. Considering that a death was caused due to the negligent driving of the accused, this was certainly not a case which ought to have been let off only by imposing fine to be paid by the accused which the accused so willingly paid and got off from the real punishment which he deserved. In my opinion, the sentence awarded to the accused is grossly disproportionate to the crime committed by the accused particularly in relation to Section 304-A IPC where the learned trial Court ought to have imposed some imprisonment on the accused so as to make the accused more careful in driving in future as well as to deter others from driving rashly or negligently. At the cost of repetition, it may be said that sentence cannot be just a flee bite and at the same time, it should be borne in mind that it should not be a bee sting either. It should be proportionate to the crime committed by an accused. Deterrence and retribution till date have remained as two facets of punishment. The Court is required not only to look at the accused but also to the interest of the society at large while imposing adequate punishment. The case at hand comes very close to the case of **Ratan Singh** v. **State of Punjab**(supra). Considering the facts of the case, in my opinion, ends of justice would be met by imposing three months simple imprisonment on the accused under Section 304-A IPC while maintaining the fines imposed by the learned trial Court under other Sections.

26. As a result, the appeal is hereby allowed. In addition to the fines imposed by the learned trial Court and which I have been told are already paid by the accused, the accused is hereby directed to undergo simple imprisonment for three months under Section 304-A IPC. The Order of the learned trial Court to that extent shall stand modified. The accused to surrender to the trial Court, to undergo the said sentence.

N. A. BRITTO, J.

RD.